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TWO PROPOSALS TO MAKE ZONING AND URBAN RENEWAL WORK TOGETHER FOR A NEW BOSTON

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TWO PROPOSALS TO MAKE ZONING AND URBAN RENEWAL WORK TOGETHER FOR A NEW BOSTON

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Planning Department
Boston Redevelopment Authority
June 1966

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The New Boston Zoning Code was actually drafted before the present multi-project redevelopment program was conceived. The 1965-1975 General Plan for the City of Boston has this to say about the relation between Zoning and urban renewal:

"Zoning and other code enforcement programs are essential to the elimination of blight, both in and outside renewal areas, and to the effective use of advanced building and site planning techniques. . . ."

"Now that Boston's New Zoning Code has been in effect since January 1965 consideration should be given to its further updating with respect to Urban Renewal projects . . . ."

This is a report to the Zoning Commission by the Boston Redevelopment Authority making two positive proposals by which zoning and urban renewal can work together as a consistent whole. It is a preliminary report, prepared for discussion. Zoning code language contained herein is tentative, and must be reviewed by the Zoning Commission's legal counsel before it is seriously considered for adoption.

The two proposed zoning code amendments are these:

I. AN AMENDMENT CREATING NEW ZONING DISTRICTS TO BE APPLIED TO DISPOSITION PARCELS.

(This is land owned by the BRA within redevelopment projects, held for sale to redevelopers).

II. AN AMENDMENT ENABLING THE BOARD OF APPEAL TO GRANT EXCEPTIONAL RELIEF FROM THE ZONING CODE IN PARTICULAR CASES TO EXPEDITE URBAN RENEWAL CONSTRUCTION.

This report presents the two amendments in this order:

I

A. Explanation of the New Zoning Districts: what they would be, and why they are needed.

B. Suggested wording for incorporating the new districts into the zoning code.

C. Legal basis for the new districts.

II

A. Explanation of the 'Exceptional Relief' tool: what it is and why it is needed.

B. Suggested wording for incorporating the 'Exceptional Relief' tool into the Zoning Code.

C. Legal basis for the 'Exceptional Relief' tool.

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I

A. Explanation of the proposed urban renewal zoning districts.

The code amendments described here would add new urban renewal districts to the zoning code. For every district now available in the code, such as the H-1 district, B-2 district, etc., a new urban renewal sub-district would be created. There would be an H-1U district, B-2U district, etc. These new districts are intended to be applied by amendment of the zoning district maps to disposition parcels within Land Assembly and Redevelopment Projects, and Urban Renewal Projects.

In Boston, such projects have local names, such as Washington Park, Charlestown, South End, South Cove, etc.

The proposed urban renewal zoning districts would impose only three kinds of controls on land disposition parcels. These controls are: Permitted Uses, Floor Area Ratio, and Off Street Parking.

The many dimensional requirements of zoning, such as lot size, lot width, height of buildings, usable open space, front yard, rear yard, side yard, setback of parapet, and percent (%) of rear yard occupied by accessory building would not be applied within the urban renewal districts. These dimensional requirements can be established by the urban renewal controls, that is, the urban renewal plan, disposition documents and the design review process.

Disposition parcels within urban renewal projects, the land to be subject to the new districts, is land owned by the Boston Redevelopment Authority and held for sale or lease to redevelopers. In most projects this publicly owned land (disposition parcels) is only 30% or less of the entire project area. Most land within renewal projects are not disposition parcels. Most land remains privately owned throughout the redevelopment process.

This publicly owned land (the disposition parcels) is overcontrolled. It is subject to all of the zoning regulations which control use of and construction upon privately owned land within the City of Boston. These disposition parcels are also subject to urban renewal controls which cover the same subject matter as zoning: use of land, size and location of structures, amount of parking, etc.

There are some fundamental differences between zoning and urban renewal controls:

1. They are based on different Massachusetts General Laws. (Zoning: Chapter 665 of Acts of 1956; Urban Renewal: Chapters 121 and 121A).

Urban renewal legislation has the special objectives of eliminating substandard, decadent conditions, providing sound housing at low cost, and creating new urban environments. The legislature declared in the Urban Renewal Law that there exists "a shortage of decent, safe and sanitary buildings for residential, commercial, industrial, institutional, recreational or governmental purposes."

2. Zoning and urban renewal are enforced by different means. Zoning relies on the granting or withholding of building permits, and prosecution, injunction, and other remedies available for general laws. Urban renewal controls are accepted voluntarily by the redeveloper as part of the terms by which he acquires the disposition parcel. They are enforced by a written agreement between the developer and the Boston Redevelopment Authority, which is embodied in deed restrictions that bind subsequent owners of the disposition parcel.

3. A carpenter, private citizen or any other land owner or his representative can prepare most building permit applications in order to comply with zoning. The developer of all but the smallest land disposition parcels under urban renewal has his building plans prepared by an architect or other design professional.

4. Zoning controls fix details in advance. The building permit applicant must meet these already established controls. Urban renewal controls are not always applied in advance. The developer finds general controls in the urban renewal plan applying to the disposition parcel that he decides to buy from the Boston Redevelopment Authority, but detailed control of use of land and size and location of structures evolve as the developer's architect gets into the problems of designing buildings for that disposition parcel.

The procedure by which the Boston Redevelopment Authority applies urban renewal controls to the evolving plans of the developer's architect is called the design review process.

The Design Review Process in Boston

There are five key elements to the design review process as practiced by the Boston Redevelopment Authority:

(1) There is a design review section consisting of experienced and well-trained architects and city planners.

(2) The work of the design review section is backed up by a Design Advisory Committee of (from private practice) architects.

(3) The Boston Redevelopment members, themselves, often pass on design review matters at their meetings.

(4) Each developer of an urban renewal parcel is given a package of text and drawings instructing him about the general design review procedure and about specific objectives for that parcel.

(5) The design review objectives are incorporated into the disposition agreement and into deed restrictions executed between the Boston Redevelopment Authority and the owner of the redeveloped site. The agreement and deed restrictions enforce the land use and building requirements of the urban renewal plan for forty years.

The Need for Urban Renewal Zoning Districts

It is in the public interest that disposition parcels be controlled both by urban renewal controls and zoning regulations, when these two are compatible. The Back Bay rea has been preserved from radical change by simultaneous enforcement of deed restrictions, special height statutes, Park Frontages ordinance adopted by the City Council, and zoning adopted by the Zoning Commission.

Furthermore, in dealing with redevelopers of disposition parcels and their architects the Boston Redevelopment Authority has a strong bargaining position because it is backed up both by zoning regulations and urban renewal controls. But it is obvious from the contrasting nature of zoning regulations and urban renewal controls that these two systems will not be compatible in all details when applied to the same disposition parcel.

Zoning regulations are intended for private land, are written to control buildings designed by untrained person, and are fixed in detail in advance of the preparation of building plans. Urban renewal controls are intended for publicly owned land, especially land that was decadent and substandard, and which is being renewed as sound, low cost housing, as needed commercial, industrial or public facilities. Urban renewal controls are inteded as directions for architects or other professional designers. Urban renewal controls are not fixed in advance, but are applied as the design of particular buildings progress.

An Example

The Castle Square development now being built on an urban renewal disposition parcel shows the conflict that can arise between the regulations within one of Boston's present zoning districts and urban renewal controls.

The Castle Square development will bring to the center of Boston about 500 units of new rental housing and 102 units for low-income elderly families. About twice this number of dwelling units would be permitted on this site, according to the H-2 zoning district. So the Castle Square urban renewal project clearly fulfills the objectives of zoning by bringing to Boston new dwellings which provide abundant sunlight, daylight and open space. Yet, there were many technical conflicts between the requirements of the urban renewal plan and the zoning code which stood in the way of the Castle Square development.

Although ample off street parking was provided, the spaces met the urban renewal plan definition but not the zoning code definition of off street parking spaces. The zoning code requirement that buildings be set back from street intersections for traffic visibility was technically violated again by Castle Square buildings located close to parking bays. Buildings are clustered close together in some parts of Castle Square, but wide common recreation spaces are provided elsewhere. Technical violations of the zoning code's minimum yard requirements resulted from this arrangement.

These technical zoning violations were resolved in Castle Square by 22 variance cases brought to the Board of Appeal. That agency does not have express powers to resolve such conflicts. Furthermore, the Board of Appeal procedure involves costly delays for urban renewal construction.

B. Suggested wording for adding urban renewal districts to the Zoning Code

Section 3-1. The following words should be added:

"There shall be an urban renewal sub-district for each of the above subdistricts. Urban renewal sub-districts shall be designated by the letter U attached to each of the above sub-districts. For example, H-1U shall refer to that urban renewal sub-district having H (apartment) permitted uses, and a maximum allowed floor area of one (1).

Uses permitted in the Urban Renewal Sub-districts are set out by Section 8-7. Dimensional requirements for urban renewal sub-districts are set out by Section 13-5.

Urban Renewal Sub-districts are intended by means of amendments to the series of maps entitled "Zoning Districts of the City of Boston", to be applied to Land Assembly and Redevelopment Projects and Urban Renewal Projects as defined by General Laws Chapter 121."

A new section should be added, as follows:

Section 8-8. Use Regulations of Urban Renewal Sub-districts

The use regulations of SECTION 8-7 shall apply to each of the Urban Renewal Sub-districts, with the following additions:

(a) As an accessory use to housing developments, and subject to limitations and and restrictions of Article 10, Section 10-1, business uses such as a food store, drug store, physician or dentist office, barber shop or restaurant shall be permitted within the H-1U through H-5U districts, when such uses are intended primarily for the convenience of residents of such housing.

A new section should be added, as follows:

Section 13-5. Dimensional Requirements of Urban Renewal Sub-districts.

Article 14, and Articles 16 through 22, and the dimensional requirements contained therein shall not apply to Urban Renewal Sub-districts.

Floor Area ratio requirements as set out in Section 13-1, Table, and Article 15, BUILDING BULK, shall apply within the urban renewal sub-districts.

Sections 13-2, 13-3 and 13-4 shall not apply to urban renewal sub-districts. Articles 23 and 24, and all other Articles of this zoning code except those specifically excluded, shall apply to urban renewal sub-districts.

A new section should be added, as follows:

Section 23-11. Parking on Certain Streets in Urban Renewal Sub-districts.

When public streets are built within urban renewal sub-districts primarily to provide access and vehicular parking for buildings erected therein, portions of such public streets intended for vehicular parking shall be considered off street parking for purposes of this article.

C. Legal Basis for the Urban Renewal Districts.

There are four legal bases for supporting creation of these districts. The first is the Zoning Enabling Act, which permits the Zoning Commission to create new districts whose regulations differ from those in other districts. The second basis is Chapter 121, the Urban Renewal Law, which in at least five places states that other laws and regulations can be adjusted to make urban renewal work. The third basis for the new districts are numerous Massachusetts cases establishing the principle that two pieces of legislation covering the same subject are to be interpreted to work as a consistent whole. The fourth legal basis for the new districts is the federal rule and practices for urban renewal. There are Federal Technical Bulletins stating flatly that the design review process of urban renewal is a superior means to zoning for the control of development or disposition parcels. Massachusetts statutes should be interpreted if possible as intending to permit administrative practices recommended by the Federal Government.

Boston's Zoning Enabling Act, Chapter 665 of the Acts of 1956, gives the Zoning Commission broad powers to create different types of districts. Section 2 states: "For any or all of such purposes a zoning regulations may divide the city into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this act, and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration or use of buildings and structures, or use of land, . . . The regulations and restrictions shall be uniform for each class or kind of buildings, structures or land, and for each class or kind of use, throughout the district, but the regulations and restrictions in one district may differ from those in other districts. Due regard shall be paid to the characteristics of the different parts of the city; and the regulations and restrictions shall be the same for zones, districts, or streets having substantially the same character."

The present zoning code demonstrates the power of the Zoning Commission to create districts having sharply different ergulations from one district to the next. The S-.3 Single Family District on the one hand permits one type of dwelling, and excludes businesses and industry altogether. Structures are limited to 35 feet in height, and floor area is limited to 30% of the total lot area. There must be one off-street parking space for each residence. By contrast, the B-10 district requires no off street parking, and permits for a given area of land thirty times as much floor area as is permitted by the S-.3 district. All types of dwellings and businesses are permitted in the B-10 district.

The new urban renewal districts would not widen the difference which exists among Boston zoning districts.

There is abundant authority from Chapter 121 of the General Laws of Massachusetts for writing zoning codes to further renewal goals. The following quotations from that statute and references to Massachusetts cases establish that the urban renewal statute and zoning statute should be read together. In Massachusetts zoning should further urban renewal as well as zoning purposes:

"It is hereby declared that there exists in certain cities and towns in this commonwealth substandard, decadent or blighted open areas which constitute a serious and growing menace, injurious to the public health, safety, morals and welfare of the residents of the commonwealth. . . "

The legislature intends urban renewal matters to be treated with urgency in the commonwealth.

"Any urban renewal project undertaken pursuant to the preceding section shall be undertaken in accordance with an urban renewal plan for the area of the project . . . which plan (2) shall indicate. . . zoning and planning changes, if any . . . "

Section 26ZZ. This section shows that zoning changes are part of urban renewal planning, and share its urgency.

"Any city or town or other public body is hereby authorized to do any and all things necessary to aid and cooperate in the planning and undertaking of an urban renewal project in an area in which such city or town or public body is authorized to act." 26BBB.

"A city or town, or the appropriate board of officer, thereof on behalf of such city or town, may upon such terms, and with or without consideration, do or agree to do any or all of the following things . . .

(d) .. establish exceptions to existing ordinances and by-laws regulating the design, construction and use of buildings;

(j) .. do any and all other things authorized by law and necessary or convenient to aid the planning, construction or operation of a housing project within its limits." 26EE.

The latter is the section quoted by Wilkins, C.J. in Russell vs. Brookline Housing Authority, 209 NE2 337 (1965), decided in June 1965 by the Supreme Judicial Court.

The Supreme Court in the Bookline case declared illegal the practice, still common in Boston, of using the Board of Appeal hardship variance power as a means to reconcile urban renewal and zoning, where the local body having zoning code amending power has not expressly delegated to the Board of Appeal power over urban renewal matters.

But the Supreme Court in the Brookline case clearly stated that a zoning code in Massachusetts could be amended to further urban renewal objectives. Such an amendment might be the creation of urban renewal districts.

"A redevelopment or housing authority is hereby authorized to delegate to a city or town or other public body or to any board of officer of such city, town or other public body or to any officer the powers of functions of the authority with respect to the planning or undertaking of an urban renewal project . . . " 26BBB.

This section declares that the Zoning Commission and the Board of Appeal can be armed with redevelopment powers, in addition to zoning powers.

The following section gives additional strength to the last-cited section:

"A redevelopment authority shall have all the powers necessary or convenient to undertake and carry out urban renewal plans and urban renewal projects . . ." 26AAA.

The principle that two pieces of legislation should be interpreted so they will operate together has been declared many times by Massachusetts courts. "A court has the duty to construe various statutory provisions touching on a point in issue with due regard to all of them as to give a practical and workable effect to the whole, as far as practicable." School Committee of Gloucester vs. City of Gloucester. 85 NE2d 429, 424 Mass. 209 (1949). "In interpreting a statute in addition to the literal meaning of words, consideration should be given to the system of law of which it is a part and statutes of the commonwealth dealing with the same general subject." Commonwealth vs. Flynn, 188 NE 627, 285 Mass. 136, 92 ALR 206 (1934).

Housing authority plans have been held relevant to show the reasonableness of a zoning designation. Lamaree vs. Commissioner of Public Works of Fall River, 87 NE2d, 324 Mass. 542 (1949). A redevelopment plan has been measured by whether it advances overall city planning: Worcester Knitting Realty Company vs. Worcester Housing Authority, 138 NE2d 356, 335 Mass. 19 (1956). In another case the court read Boston's zoning statute and its building department statute together. Real Properties vs. Board of Appeal of Boston, 42 NE2d 339, 311 Mass. 430 (1942).

Federal Guidance on Adjusting Zoning to Urban Renewal Controls

U.S. Urban Renewal Administration Technical Guide No. 16 explains the need for accommodating the zoning code to the design review process. "Many past problems of urban renewal land use control stem from lack of understanding of the special opportunities for creative regulation afforded by the renewal process. Experience with the public regulations of land use is limited largely to 'police power' controls under zoning and subdivision regulations. Such controls are founded upon the twin principles of uniformity of application and withholding development rights - and thus influencing land value - only where public health, safety, morals or general welfare is threatened."

"Land Use Control in urban renewal starts from a sharply different premise. The requirements that land be valued for its planned uses automatically recognizes the impact of Plan Controls on potential development rights. The appraisal and disposition processes take into account any effect on land value. Thus the nature and intensity of controls need not be limited by a concern which restricts the exercise of 'police power' zoning and subdivision regulations. For the same reason, there is no requirement for uniform application throughout a project area. Each parcel may be controlled independently and its value determined accordingly. Thus, Urban Renewal Plan Controls and design objectives may be tailored to fit the specific purposes and goals of each project and each tract within the project."

The Zoning Code specifies precisely such matters as minimum lot size, lot width, height of building, usable open space, front yard, side yard, rear yard, setback of parapets; amount of rear yard to be occupied by accessory buildings, off-street parking requirements, etc. On the other hand, experience rapidly being gained in Boston, and other cities with the control of new construction in urban renewal parcels points to a different control strategy.

For example, the design review process may ask the developer to create profiles by means of building towers which have a distinctive silhouette, or to form a visual terminus to certain main streets, or to be a cohesive architectural group yet allow each building to be separately identifiable, to take advantage of the panoramic views from the site, to relate to one another in such a way as to ensure privacy, light and air for each dwelling. Experience with design review is beginning to show that such general objectives produce better design than specific zoning code type regulations.

William L. Slayton, recent Federal Urban Renewal Administrator, stated six years ago that traditional zoning is an obstacle to effective redevelopment.

"The antiquity of the average city's planning law and procedures creates an obstacle to urban renewal that frequently prohibits the attainment of the urban renewal objective. Zoning is a major villain. Designed to meet the planning objectives of the thirties and written for the single lot and its protection from adjacent users, it is unsuited for the planned renewal area. Zoning is a major stumbling block to achieving the objectives of large scale urban renewal."

" . . . the cumbersome side yard requirements, setbacks, building envelope, space between buildings, and so forth, dictate the design of these areas, rather than the designer."

"Good design in these redevelopment areas has been achieved in spite of the zoning ordinance by various means,usually by appeal to the Board of Appeal or its counterpart. In some instances, the zoning ordinances have been amended to permit the design proposed."

"In Washington, D.C., the redevelopment plan takes precedence over the zoning ordinance." page 807, Law and Contemporary Problems, Autumn 1960.

II

A. Explanation of the 'Exceptional Relief' Tool. What it is and why it is needed.

If the urban renewal zoning districts described in Part I were available, there would nevertheless be particular instances within urban renewal projects where extraordinary relief from zoning is appropriate.

The 'exceptional relief' tool would be exercised by the Board of Appeal at the petition of a property owner after the owner has applied for and been denied a building permit. The Board of Appeal could direct the issue of a building permit to further the objectives of an urban renewal plan, when this is in harmony with the general purposes and intent of the zoning code. Article 6 of the Zoning Code sets out a ready made procedure for this proposed Board of Appeal power.

The exceptional relief power would be useful in these situations:

(1) In rehabilitation portions of urban renewal projects, where zoning requirements are in conflict with rehabilitation standards and objectives as established by the urban renewal plan;

(2) In disposition parcels of urban renewal projects, when such parcel has been zoned to the appropriate urban renewal zoning district, yet there is some conflict between the zoning regulations (permitted uses of land, maximum floor area ratio, minimum off-street parking requirements) and the objectives of the urban renewal plan;

(3) In disposition parcels which for some reason (such as timing, or unanticipated proposals) the disposition parcel has not been zoned to the appropriate urban renewal zoning district, and there is a conflict between a zoning requirement and the objectives of the urban renewal plan.

The legislature declared conditions within urban renewal areas (before redevelopment is started) to "constitute a serious and growing menace, injurious to the public health, safety, morals and welfare of the residents of the commonwealth." Redevelopment is urgent, and should not be delayed by unanticipated zoning technicalities. The exceptional relief tool will enable actual construction and rehabilitation to move ahead, while zoning technicalities are being ironed out in preparation for subsequent building proposals of a similar nature. The tool would be especially valuable to solve non-recurring problems having to do with particular proposals and sites.

B. Suggested Wording for Incorporating the 'Exceptional Relief' Tool into the Zoning Code.

"Section 6-5. Exceptional Relief within Urban Renewal Projects

The Board of Appeal may authorize with respect to a particular parcel of land or an existing or proposed building, when such land or building is located within a Land Assembly and Redevelopment project, or Urban Renewal Project as defined by General Law Chapter 121, an exception to the terms of this zoning code where a literal enforcement would frustrate or delay the objectives of the urban renewal plan for that project, and where desireable relief may be granted which is in harmony with the general purpose and intent of the zoning code. The power may be used to permit particular construction and rehabilitation in these and similar cases: as a temporary means of expediting construction during preparation and processing of a general amendment to the zoning code or district map; where there are conditions especially affecting such parcel or such existing or proposed building but not affecting generally the zoning district in which it is located; to resolve in the particular case a conflict between zoning regulations and urban renewal objectives. An applicant for a building permit within an urban renewal project may appeal for the conditional use described in this section. This power shall be exercised subject to the provisions of Section 6-2, 6-3, and 6-4."

C. Legal Basis for the Exceptional Relief Tool.

The proposed 'exceptional relief' amendment to the Zoning Code is based on Section 10 of the zoning enabling act, Chapter 665 of the Acts of 1956. This section enables the Zoning Commission to delegate to the Board of Appeal power to grant exceptions within limits described by the Zoning Commission. The proposed Zoning Code amendment is not based on the more limited Section 8 of the zoning enabling act. Section 8 is the 'hardship variance' power; it cannot apply to proposed buildings but only to hardships arising from existing buildings and from "conditions affecting (the) parcel".

According to case law, the Zoning Commission has broad powers to delegate administrative discretion to the Board of Appeal. Lynch vs. Commissioner of Education, 56 NE2d 896, 317 Mass. 73 (1944); Scannel vs. State Ballot Law Commission, 87 NE2d 16, 324 Mass. 494 (1959); Paquette vs. City of Fall River, 155 NE2d 775, 338 Mass. 368 (1959); Commissioner vs. Sargent, 117 NE2d 154, 330 Mass. 690 (1953). The rule making power of Boston Zoning agencies was acknowledged in Archbishop of Boston vs. Board of Appeal of Boston, 167 NE 672, 268 Mass. 416 (1929); Co-Ray Realty Co. vs. Board of Zoning Adjustment of Boston, 101 NE2d 888, 328 Mass. 103 (1951).

Massachusetts law makes it clear that redevelopment is urgent, that redevelopment law and zoning law must be interpreted and administered as a whole, and more specifically that the local zoning legislative body can delegate to the Board of Appeal the powers that are proposed here.

The Brookline Housing Authority petitioned its Board of Appeal for relief from parking requirements for a particular low-income housing for the elderly project. The Board of Appeal cooperated, using its power to grant variances in case of hardship. The Supreme Court held that the variance power could not be used for proposed buildings, but went on to specifically authorize the zoning code amendment that is proposed here. The court states: "The problem of an excessive number of parking spaces for this type of project with which the board sought to deal by the variance can be eliminated by vote of the town meeting (equivalent to Zoning Commission action in Boston) amending the by-law to authorize the zoning board of appeal to "establish exceptions to existing . . . by-laws regulating the design, construction and use of buildings", as stated in Chapter 121 S 26EE.

Wilkins, C.J. in Russell vs. Brookline Housing Authority 209 NE2 337 (1965), decided in June 1965 by the Supreme Judicial Court.

The 'exceptional relief' tool is similar to the proposed urban renewal zoning districts in that both draw legal support from that language of Chapter 121 which authorizes other agencies to cooperate with urban renewal objectives, and which authorizes amendments and exceptions which foster urban renewal to be written into non-urban renewal regulations. This language from Chapter 121 was quoted under I.C., Legal Basis for the Urban Renewal Zoning districts. The principle that two pieces of legislation on the same subject should be interpreted as a whole applies to the 'Exceptional Relief' tool. The two pieces of legislation are of course the General Laws on Zoning and those on Urban Renewal. Massachusetts cases establishing this principle were cited in I.C.

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The two zoning code amendments proposed in this report are simple, well supported by experience and law, and are calculated to increase the effectiveness of zoning and urban renewal as coordinated powers needed to build a New Boston.

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Two proposals to make zoning and urban renewal work together for a new Boston.